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# Combating Harmful Invasive Species Under the Lacey Act: Removing the Dormant Commerce Clause Barrier to State and Federal Cooperation

Laura T. Gorjanc*

*Fordham University School of Law

# COMBATING HARMFUL INVASIVE SPECIES UNDER THE LACEY ACT: REMOVING THE DORMANT COMMERCE CLAUSE BARRIER TO STATE AND FEDERAL COOPERATION

*Laura T. Gorjanc*

## INTRODUCTION

The introduction of invasive species is a serious threat to American wildlife. In 2002, Maryland drew international attention after it launched a crusade to eradicate northern snakeheads, a nonnative exotic fishspecies, from several ponds in the state.[1] A local Mary-

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1. Anita Huslin, *Snakeheads Slipped a Fatal Dose; Potent Toxin Nets Scores of Alien Species*, WASH. POST, Sept. 5, 2002 at B01; *See also* Judith Person, *Snakehead No. 18 Caught in Potomac; 19-inch Fish Found at Dogue Creek*, WASH. TIMES, Aug. 25, 2004 at B03 [hereinafter *Snakehead No. 18*]; Lee Bergquist, *'Frankenfish' Cousin Found in State*, MILWAUKEE J. SENTINEL, Sept. 24, 2003 at 1A [hereinafter *Frankenfish*]. Besides its aggressive disposition, other factors render snakeheads a particularly onerous threat to American wildlife:

> Native to Asia and Africa, snakehead fish have no natural predators in the United States and pose significant threats to native wildlife communities in this country. The animals are capable of moving short distances on land and can withstand extreme weather conditions.

*Arrest Made for Possession, Sale of Snakehead Fish*, U.S. NEWSWIRE, FEB. 27, 2003 *available at* 2003 WL 3728408. After the discovery of more snakeheads in Maryland waters in May of 2004, the success of Maryland's attempt at eradicating the species is still uncertain. *See Ruinous Fish Out of Lake*, N.Y. TIMES, May 3, 2004 at A19.

land man dumped two snakeheads into one pond and within two years over 100 of the extremely voracious fish, which have a seemingly insatiable appetite for other fish, were wreaking havoc in three area ponds and threatening life in other nearby waterways.[2] Recently, the snakehead appeared in both a Wisconsin river[3] and lakes in a Philadelphia park.[4] Most worrisome, however, is that by the summer of 2004, at least eighteen snakeheads were caught along Maryland's Potomac River or its tributaries, leading some scientists to believe that the fish is establishing itself in the greater-Washington D.C. area.[5] In response, the federal government recognized the snakehead as a danger to all American wildlife and outlawed its importation or interstate transportation nationwide.[6]

Such purely federal approaches to combating invasive species, however, have proved unsuccessful. Though state approaches to combat invasive species have been more successful, they are insufficient to address the problem of invasive species. The solution is federal and state cooperation through enforcement of the Lacey Act.[7]

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2. Rona Kobell, *Snakehead Poisoning Mired in Details; Coordination Effort Delays Plan to Eradicate Fish*, BALT. SUN, Aug. 12, 2002 at 1B.

3. *See* Frankenfish *supra* note 1.

4. Ramona Smith, *Run! Swim! Frankenfish is Here!*, PHIL. DAILY NEWS, Sept. 7, 2004 at 10.

5. David A. Fahrenhold & Joshua Partlow, *Snakeheads May be Making Home in Potomac; Fishermen and Scientists Show Mix of Alarm, Intrigue Over Transplanted Species*, WASH. POST, June 30, 2004 at B01; *See also* Patrik Jonsson, *'Frankenfish' and the Hunt for Invasive Species; A Thriving Newcomer May Threaten Potomac's Beloved Bass, Sparking a Search-and-Destroy Mission*, CHRIST. SCIENCE MONITOR, Aug. 19, 2004 at 3; *see also* Snakehead No. 18, *supra* note 1.

6. *See* 50 C.F.R. § 16.13 (2003); s*ee also* U.S. Fish and Wildlife Service, *Import Restrictions on Live Snakehead Fish, Eggs, Is Effective Friday, U.S. Fish and Wildlife Service Announces*, (October 3, 2002), *at http://news.fws.gov/newsreleases/r9/853E1B09-2B03-4BF9-B508CC7A4982DCE5.html.*

7. 16 U.S.C. § 3372 (1988).

Congress enacted the Lacey Act in 1900,[8] to "aid enforcement of state wildlife laws."[9] Congress recognized that the best way to protect American wildlife from invasive species is for the federal government to work side-by-side with the states.[10] A judge-made Common law doctrine called the Dormant Commerce Clause, however, poses a constant threat to state invasive species laws used to effectuate the purpose of the Lacey Act.[11] Federal and state governments lose an important tool in wildlife protection when courts strike down these state predicate laws under the Dormant Commerce Clause. Although the Dormant Commerce Clause plays an important role protecting interstate commerce from protectionist state legislation, this paper argues that courts should scrutinize state invasive species laws used as State Invasive Species Lacey Act Predicates. ("SISLAPs") differently than they do state laws affecting interstate commerce because of the crucial role they play in enforcing the Lacey Act. Part I of this paper explains the history and content of the Lacey Act. It also discusses the relationship between the Lacey Act and state law and the Lacey Act's role in the fight against invasive species. Part II explains the history of the Dormant Commerce Clause and discusses why the Dormant Commerce Clause applies to SISLAPs and more specifically why courts currently scrutinize SISLAPs as intensely as any other laws. Finally, Part III argues that the courts should scrutinize SISLAPs more leniently under the Dormant Commerce Clause by adopting a distinct Dormant Commerce Clause test for SISLAPs. Under this test, courts should presume that the SISLAP effectuates the purpose of the Lacey Act, while requiring that the SISLAP be narrowly tailored. This test better balances the concerns underlying the Dormant Commerce Clause with the unique purpose of SISLAPs.

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8. *Id.*; 33 CONG. REC. 4871 (1900) ("This bill gives the Secretary of Agriculture power to aid in the reintroduction, which . . . will prove a useful adjunct to the action of the States which have undertaken the preservation of the native wild birds.").

9. MICHAEL J. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 1-2 (3d ed. 1997).

10. *See* S. REP. No. 97-123, at 2 (1981).

11. *See* Maine v. Taylor, 477 U.S. 131, 140 (1986) (holding Lacey Act predicate laws may be subjected to strict scrutiny by courts).

## I. THE LACEY ACT

### A. *History and Content*

In 1900, Iowa Congressman John Lacey proposed legislation to preserve and restore wildlife resources in the United States.[12] By proposing what later became the Lacey Act, Congressman Lacey sought to address the rapid population decline of the passenger pigeon and other bird species in several states[13] and, more importantly for the purposes of this paper, the dangers that exotic plants and

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12. Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LAND L. REV. 27, 36-37 (1995). Lacey was not the only person concerned with the health of the nation's wildlife. Indeed, Lacey enjoyed widespread support for his proposed legislation: "[h]orticulturists, agriculturists, and lovers of birds everywhere, and also the League of American Sportsmen, and others interested in game and the protection of game all over the United States have been strongly enlisted in its support." 33 CONG. REC. 4871 (1900).

13. U.S. Fish & Wildlife Service, *Nation Marks Lacey Act Centennial* (May 26, 2000), *at* http://news.fws.gov/newsreleases/R9/A11C3D49-AC20-11D4-A179009027B6B5D3.html [hereinafter *Lacey Act Centennial*]. Congressman Lacey explained how his proposed act would remedy the problem of endangered species generally:

> The wild pigeon, formerly in this country in flocks of millions, has entirely disappeared from the face of the earth. Some hopeful enthusiasts have claimed that the pigeon would again be heard from in South America, but there seems to be no well-grounded basis for this hope. In some localities, certain kinds of grouse have almost entirely disappeared. This bill gives the Secretary of Agriculture power to aid in the reintroduction, which, I think, will prove a useful adjunct to the action of the States which have undertaken the preservation of the native wild birds.

33 CONG. REC. 4871 (1900).

animals posed to native fish and wildlife populations.[14] Congressman Lacey explained the damage invasive species posed to beloved native birds at the turn of the last century and how his proposed act could have alleviated the demise of these native species:

> [i]f [the Lacey Act] had been in force at the time the mistake was made in the introduction of the English sparrow we should have been spared from the pestilential existence of that 'rat of the air,' that vermin of the atmosphere. But some gentlemen who thought they knew better than anybody else what the country needed saw fit to import these little pests, and they have done much toward driving the native wild bird life out of the States.[15]

Thus, Lacey envisioned a law that would protect native wildlife by curing the problem of the importation of invasive species.

The Lacey Act was not only the "first far-reaching federal wildlife protection law"[16] but more specifically, marked the first federal attempt to control the introduction of exotic animals.[17] As enacted in 1900, the statute enabled the federal government to help the states

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14. John L. Dentler, *Noah's Farce: The Regulation and Control of Exotic Fish and Wildlife*, 17 U. PUGET SOUND L. REV. 191, 210 (1993).

15. 33 CONG. REC. 4871 (1900). Besides the English Sparrow, Lacey also identified other species, such as the mongoose, that had proven detrimental to native wildlife populations elsewhere and whose importation the Secretary of Agriculture could prevent in his discretion under the Lacey Act:

> [t]he mongoose, a miserable, murderous animal that was introduced for the purpose of killing snakes in Jamaica . . . [it] has proved a nuisance and a pest worse than the serpent that it kills. It drove the rats in Jamaica to the trees and the rat now there has become an arboreal animal. The rat still exists and keeps out of the way of the mongoose. But the birds of the island have been almost destroyed by this imported pest.

*Id.*

Today, the federal government prohibits the importation of the mongoose along with the flying fox, European rabbit, India dog, raccoon dog, and brushtail possum. 50 C.F.R. § 16.11 (2003).

16. Lacey Act Centennial, *supra* note 13.

17. Dentler, *supra* note 14 at 210.

control the importation of foreign birds and animals by supplementing state laws to forbid the interstate commerce in such animals and birds when killed or caught in violation of local laws.[18] Over one hundred years after its enactment, the Lacey Act is still the preeminent government weapon against illegal wildlife trafficking.[19] Between 1993 and 1994 over 700 charges of Lacey Act violations were filed in federal courts.[20] Moreover, in 1999 alone, the United States Fish and Wildlife Service investigated more than 1500 possible Lacey Act violations.[21]

To increase the Lacey Act's potency, Congress amended it several times, most recently in 1981[22] and 1988.[23] Today, the Lacey Act renders it unlawful for anyone to "import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported or sold in violation of any law . . . of the United States."[24] Additionally, the Act also makes it unlawful to "import, export, transport, sell, receive, acquire, or purchase in interstate . . . commerce . . . any fish or wildlife [or plant] taken, possessed, transported or sold in violation of any law or regulation of any State."[25] Consequently, to violate the Lacey Act, "a person must do something to wildlife that has already been taken or possessed in violation of [some] law."[26] Specifically, the Lacey Act relies on the violation of a predicate law, which may be a violation of a federal law, Indian tribal law, foreign law, or most importantly for the purposes of this paper, state law.

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18. H.R. REP. NO. 56-474, at 2 (1900).

19. Anderson, *supra* note 12 at 29.

20. *Id.* at 36.

21. Lacey Act Centennial, *supra* note 13.

22. *See* S. REP. NO. 123, 97th Cong., 1st Sess. at 1 (1981).

23. 16 U.S.C. §3372 (1988). The 1988 amendment to the trafficking provision of the Lacey Act is contained in the current statute.

24. 16 U.S.C. § 3372 (1) (1988).

25. 16 U.S.C. §§ 3372(2)(a) & (b) (1988).

26. *See* Samuel R. Justice, *Fish and Wildlife*, 22 ENV. L. 1213, 1217 (1991); United States v. Carpenter, 933 F.2d 748, 750 (9th Cir. 1991) (citing Migratory Bird Treaty Act, 16 U.S.C. §§ 703-713 (1988)).

### B. *The Lacey Act and State Law*

Though the Lacey Act is a federal law, its aim is not to increase "the Federal role in managing wildlife," but rather to create "a Federal tool to aid the States in enforcing their own laws concerning wildlife."[27] Thus, the federal government relies on the states to help effectuate the purpose of the Lacey Act — the preservation of wildlife.

In 1900, when Congress passed the original act, many states already had wildlife protection laws.[28] States, however, were unable to enforce these laws effectively because the rapid transit facilitated illegal trafficking.[29] For example, despite the enactment of a Florida law criminalizing the killing of roseate spoonbills, the mass slaughter of the birds continued because demand for its beautiful pink feathers remained high.[30] Moreover, prior to the enactment of the Lacey Act "all kinds of game [were] shipped concealed in various methods to other States where they [were] sold in the open market."[31] Congressman Lacey explained the situation before Congress:

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27. S. REP. No. 97-123, at 2 (1981).

28. H.R. 474, 56th Cong., 1st Sess. at 2 (1900). For instance, Lacey cites Georgia as having particularly rigid laws regulating the taking of game birds, and Florida as imposing criminal sanctions on hunters of birds whose plumes were taken for use in the millinery industry. 33 CONG. REC. 4871, 4872 (1900).

29. 33 CONG. REC. 4872 (1900).

30. *Id.* One commentator explained the gravity of the situation:

> [a]s early as 1885 and 1886 entire colonies [of inedible water birds] were wiped out along Florida's Gulf Coast where rewards to the hunters ran from forty cents for a graceful mating plume . . . of the Great White Heron up to two dollars for the pink-hued body and breast of the Roseate Spoonbill. In some instances, when only a portion of the bird was of value, . . . the hunters removed those parts and left the offal in the field. The record kill for one man in one season was 141 thousand birds.

THEODORE WHALEY CART, THE STRUGGLE FOR WILDLIFE PROTECTION IN THE UNITED STATES, 1870-1900: ATTITUDES AND EVENTS LEADING TO THE LACEY ACT, 30-31 (1971); Auk, XVII (January, 1900), 94, 95.

31. H.R. 474, 56th Cong., 1st Sess. at 2 (1900).

> [t]rappers go Georgia and catch the quail, net or trap them in violation of local law, pack them in barrels or boxes and ship them to other markets in the United States. It is done secretly. The result is that the market houses in other States have been utilized as places in which to dispose of these birds and animals killed in violation of the laws of the State.[32]

It was difficult enough for states to enforce their own wildlife protection laws within their borders, but once the wildlife was within the stream of interstate commerce, the states were completely powerless.[33] The Lacey Act presented a solution to this problem.

Congress passed the Lacey Act to extend state wildlife protection laws into the realm of interstate commerce.[34] At the time of its enactment, states could not directly regulate interstate commerce[35] and the federal government could not regulate conduct occurring solely within a state.[36] Congress, in enacting the Lacey act explained it this way:

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32. 33 CONG. REC. 4871 (1900).

33. *See* H.R. 474, 56th Cong., 1st Sess. at 2 (1900) (noting "State laws can have no extraterritorial force...and the national laws cannot operate in a single State").

34. *See id.*

35. *See H.R.* 474, 56th Cong., 1st Sess. at 2 (1900) (noting "State laws can have no extraterritorial force."); *see also*, Cooley v. Bd. of Wardens, 53 U.S. 299, 299 (1851). In *Cooley*, the Court drew distinctions between legislative subject matter that was truly national versus subject matter that was exclusively entrusted to the states. *Cooley, 53 U.S. at 318.* According to the *Cooley* doctrine, the Commerce Clause precluded a state from regulating a truly national subject, such as goods in interstate commerce like wildlife. *See* Welton v. Missouri, 91 U.S. 275 (1876) (holding that Congress has the exclusive power to regulate "transportation and exchange of commodities").

36. *See* H.R. 474, 56th Cong., 1st Sess. at 2 (1900) (noting "[N]ational laws can not operate in a single State."), *see also Cooley*, 53 U.S. at 319. *Cooley* also dictated that the Commerce Clause precluded Congress from regulating truly local matters. *Id.* Moreover, at the time of the Lacey Act's passage, it was widely thought that wildlife belonged collectively to the residents of a state and thus the regulation of wildlife preservation was believed to be a purely local

> [t]his bill is intended to begin where the State laws leave off. The State laws can have no extraterritorial force and the national laws can not operate in a single State. But interstate commerce is wholly in the control of the Federal Government. Where the States are powerless to protect themselves the National Government has ample power. This bill goes to the very root of this matter by forbidding interstate commerce in such animals and birds when killed or caught in violation of local laws.[37]

Thus, simply enacting federal legislation would not solve the problem of wildlife taking and trafficking. Instead, Congress created a two-tiered system for holding illegal wildlife traffickers accountable.[38] The first tier consists of an underlying or predicate law or regulation that regulates the taking, possession, transportation, or sale of wildlife.[39] This predicate law or regulation may be a federal law, Indian tribal law, foreign law or state law.[40] SISLAPs generally regulate the transportation of wildlife by banning the importation of invasive species.[41] Examples of other state laws that could serve as Lacey Act predicate laws include: laws that completely ban the taking of certain wildlife;[42] laws that ban hunting certain species outside of a designated season for hunting;[43] and laws that prohibit the possession of illegally taken wildlife.[44]

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issue and out-of-reach of Congress. *See* Geer v. Connecticut, 161 U.S. 519, 529 (1896).

37. H.R. 474, 56th Cong., 1st Sess. at 2 (1900).

38. Justice, *supra* note 26 at 1216-1217.

39. 16 U.S.C. § 3372 (1988).

40. *Id.*

41. *See, e.g.*, MINN. STAT. § 84D.02 (2002) (establishing "a statewide program to prevent and curb the spread of harmful exotic species"); TEX PARK & WILD. CODE § 66.015 (2003) (regulates the introduction of nonnative game fish into the public water of Texas).

42. *See, e.g.*, HAW. REV. STAT. § 183D-62 (2003) (pertaining to wild birds in Hawaii).

43. *See, e.g.*, 10 VT. STAT. ANN. § 4741 (2001) (establishing a sixteen day deer hunting season in Vermont).

44. *See, e.g.*, S.D. CODIFIED LAWS § 41-14-1 (2003) (making it a criminal offense to possess or control any unlawfully taken bird, animal, or fish in South Dakota).

The second tier of the Lacey Act makes it a crime to "import, export, transport, sell, receive, acquire, or purchase" wildlife that was taken, possessed, transported, or sold in violation of a predicate law.[45] Thus, the Lacey Act does nothing in and of itself. Except for federal predicate laws, the federal government is reliant on Indian tribes, foreign countries, and states to determine what species of wildlife need protecting and what species those jurisdictions need protection from. The federal government is often reliant on the states to regulate wildlife because Lacey Act prosecutions often involve predicate state laws. In addition, originally, the only predicate laws were state laws.[46] Congressman Lacey was mostly concerned with empowering state laws to be more effective at protecting wildlife.[47] For these reasons, Congress has enlisted the states as partners in effectuating the purpose of the Lacey Act.

### C. *A Federal Tool to Enforce State Invasive Species Laws*

The federal government may use the Lacey Act to combat the introduction of invasive species in two ways. First, the regulations implementing the Lacey Act generally prohibit the importation of live wildlife that is injurious to the United States.[48] However, these federal regulations are notoriously weak.[49] These regulations adopt a "dirty list" approach — that is, the regulations only prohibit those species that are designated by the Department of the Interior from entry into the United States.[50] This centralized dirty list approach has proven to be ineffective. The Department of the Interior only

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45. 16 U.S.C. § 3372 (1988).

46. *See* CART, *supra* note 30 at 190 (reprinting the original Lacey Act).

47. *See* 33 CONG. REC. 4871 (1900).

48. 50 C.F.R. § 16.3 (1992); *see also* 18 U.S.C. § 42 (1994).

49. *See* David M. Whalin, *The Control of Aquatic Nuisance Non-indigenous Species*, 5 ENVTL. LAW. 65, 104 (1998) (recognizing the federal regulations of invasive species of the Lacey Act to be a "failure" in combating the problem of invasive species); Dentler, *supra* note 14 at 212-13 (noting that the shortcomings of these regulations have been recognized for at least thirty years).

50. Eric Biber, *Exploring Regulatory Options for Controlling the Introduction of Non-Indigenous Species to the United States*, 18 VA. ENV'L L. J. 375, 391 (1999).

lists species that have proven elsewhere to be harmful to native wildlife.[51] Moreover, the federal government must overcome a high burden of proof to justify the designation of a species as sufficiently injurious.[52] Thus, the regulations prohibit only the absolute worst offending nonnative species from entering the United States.[53]

The second way in which the Lacey Act combats the problem of invasive species is by elevating violations of state laws that regulate the importation of invasive species to federal offenses.[54] States regulate invasive species by either allowing the importation of species designated on a "clean list"[55] or by banning the importation of species designated on a "dirty list."[56] Whatever the form, the federal government may use state laws that regulate the importation of wildlife into the state as Lacey Act predicate laws.[57]

Using the Lacey Act to elevate an offense of state invasive species laws to a federal offense is a more effective way to combat invasive species than relying merely on the federal regulations under the Lacey Act. First, the use of the Lacey Act in this way increases the potency of state laws. This is particularly important because not only have the federal regulations under the Lacey Act been ineffective in combating invasive species, but other attempts at federal invasive species regulations have also been generally unsuccessful.[58]

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51. Dentler, *supra* note 14 at 211.

52. Whalin, *supra* note 49 at 105.

53. *See generally id.*

54. 16 U.S.C. § 3372(a) (1988); *see also* Maine v. Taylor, 477 U.S. 131 (1986) (upholding a Lacey Act violation where an individual imported bait fish in violation of Maine law).

55. *See, e.g.*, CAL. FISH & GAME CODE § 2271 (1998) (restricting the importation of live aquatic plants or animals into the state of California without a permit).

56. *See, e.g.*, HAW. REV. STAT. §§ 150A-6.1 – 150A-6.3 (2003) (restricting importation of listed plants, animals, or microorganisms into the state of Hawaii).

57. *See generally* 16 U.S.C. § 3372(a) (1988).

58. *See e.g.*, The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (NANCPA), 16 U.S.C. § 4711(a) (1997), and the National Invasive Species Act of 1996 (NISA), 16 U.S.C. § 4711(b)(2)(B)(i) (1997) (regulating the inadvertent importation of invasive species, mainly the notorious zebra mussel, from the ballast water of ships traveling on the Great Lakes).

Such laws, like the Lacey Act federal regulations, are extremely limited in scope and thus extremely limited in their effectiveness.[59]

Fixing these federal laws would likely not be enough. Because of the geographic nature of the problem, states are simply in the best position to effectively regulate invasive species.[60] One commentator concisely enumerated the reasons why the states are more capable of effectively regulating invasive species:

> a state has firsthand knowledge of what kinds of [invasive species] may be entering its jurisdiction and through which vectors. [Also], a state can better monitor the myriad of [invasive species] that are in its jurisdiction. Next, as a general rule, state response is more immediate than federal response in acute situations. Finally, a state process is often less cumbersome than a federal process, allowing more flexibility and efficiency in approaching [invasive species] management.[61]

Despite the need for state invasive species law to recognize the variation in degree and kind of the invasive species problem from region to region, state regulation of invasive species without the cooperation of the federal government is not without its critics.[62] The

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59. *See* Viki Nadol, *Aquatic Invasive Species in the Coastal West: An Analysis of State Regulation Within a Federal Framework*, 29 ENVTL. LAW. 339, 358-59 (1999) (noting that the scope of the mandatory regulations of the Acts are limited to the Great Lakes region and that the only aquatic invasive species subject to regulation under the Acts is ballast water).

60. *See* Biber, *supra* note 50 at 463-64 (recognizing that local variations in wildlife populations and ecosystems necessitate different treatment of the problem of invasive species based on geography). *See also* National Invasive Species Council, *National Management Plan: Meeting the Invasive Species Challenge*, *at http://www.invasivespecies.gov/council/actionplan.shtml* (Jan. 18, 2001) (outlining the National Invasive Species Council's 2001 action plan drafted in accordance with Exec. Order No. 13,112, 3 C.F.R. Exec. Order 13,112 (2000)).

61. Nadol, *supra* note 59 at 372.

62. *See, e.g.*, Dentler, *supra* note 14 at 229-30 (1993) (arguing that a state-only approach is bound to fail because wildlife cannot be contained in one state and that state-by-state regulation is economically inefficient).

typical criticism of a state-only approach to combating invasive species is that:

> [b]y their very nature, [invasive species] are interjurisdictional and, therefore, pose threats that are national in scope. In addition, state-by-state regulation can produce inconsistent results and conflicts and states lack the power to control the importation and release of [invasive species] in neighboring states. Further, although federal regulation may be difficult to initiate, once it is enacted it can be broad in scope and application.[63]

However, these "problems" with a state-law-only approach are also its assets. It is true that some invasive species are harmful in every part of the U.S.[64] It is also true that a native species in one part of the U.S. may be a danger to the wildlife in another region.[65] Moreover, a species not native to the U.S. may pose a particular risk to one region of the country while posing virtually no threat to another.[66]

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63. Nadol, *supra* note 59 at 372.

64. Some species nonnative to the U.S. are so resistant to climate and geographical variations that they threaten the entire United States. The snakehead is one such species. *See supra* note 1 and accompanying text. Also, new potential threats to the wildlife of the United States are genetically engineered animals and plants. For example, a Texas company recently stated its intention to sell "GloFish" which are zebra fish with an added red coral gene that makes them glow in the dark. Andrew Pollack, *Gene-Altering Revolution Is About to Reach the Local Pet Store: Glow-in-the-Dark Fish*, N.Y. TIMES, Nov. 22, 2003, *available at* http://www.nytimes.com/2003/11/22/science/22FISH.html?8hpib. Some environmental groups fear that if these and other genetically altered pets are released into the wild they could wreak havoc on native wildlife. *Id.*

65. Walleye, for example, is a fish that threatens the wildlife in the Columbia River system in Washington, but are native to the Great Lakes region of the U.S. Nadol, *supra* note 59 at 340, n.5.

66. Saltcedar is a nonnative plant particularly fond of the climate in the southwest United States, where it oozes salt from its leaves that accumulates in the soil and prevents other plants from growing near it. The Nature Conservancy, *The Invasive Species Initiative Tamarix species: Saltcedar (Tamarisk) at*

Nevertheless, the state-only approach is imperfect and the Lacey Act is at least a partial solution to its problems. When violations of state invasive species laws are elevated to federal offenses, the state policy behind the law is elevated to national policy. Elevating violations of state invasive species laws to federal offenses would make it more likely that someone who is considering importing an animal or plant is on notice that such importation may be illegal. This is especially true for an out-of-state importer. Moreover, the federal government may pick and choose which state violations it wishes to elevate to federal offenses which would effectively reward states that pass laws that effectuate federal objectives and thus lead to more uniform state laws. Although some of the problems associated with a state-law-only regime for combating invasive species remain, the best method for combating the importation of invasive species is to increase Lacey Act prosecutions for the violation of state invasive species laws.

## II. THE DORMANT COMMERCE CLAUSE

The main barrier to protecting native wildlife from invasive species via Lacey Act prosecutions is the Dormant Commerce Clause.[67] The Dormant Commerce Clause applies to any state law that potentially overly burdens interstate commerce.[68] In other words, courts will scrutinize any state law that directly or indirectly affects interstate commerce. Because SISLAPs regulate goods—in this case, wildlife—transported in interstate commerce, SISLAPs potentially overly burden interstate commerce and are thus subject to Dormant Commerce Clause scrutiny.[69]

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http://tncweeds.ucdavis.edu/worst/tamarix.html#map (updated March, 2002). Saltcedar is not a serious threat in any other region of the United States. *Id.*

67. Nadol, *supra* note 59 at 360-61; Whalin, *supra* note 49 at 106-07.

68. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, 401 (2d ed. 2002).

69. *See generally Maine* v. Taylor, 477 U.S. 131 (1986). For a discussion of this case see *infra* Parts II.A-B.

### A. *History*

The Dormant Commerce Clause does not appear in the Constitution.[70] Rather, it is a judicially created doctrine that serves to protect what the Supreme Court deemed to be the purpose of the Commerce Clause—competition among the states rather than protectionism and isolationism.[71]

The Constitution granted Congress the power to "regulate Commerce . . . among the several states."[72] The Framers included the "Commerce Clause" because under the Articles of Confederation the states had unlimited power to regulate commerce and enacted protectionist legislation that isolated internal markets from external competition.[73] The Supreme Court articulated it this way:

> The design and object of [the power to regulate interstate commerce], as evinced in the history of the Constitution, was to establish a perfect equality amongst the several States as to commercial rights, and to prevent unjust and invidious distinctions, which local jealousies or local and

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70. *See* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW–SUBSTANCE & PROCEDURE § 11.1 (3d ed. 1999).

71. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322, 325 (1979) ("[T]he Commerce Clause . . . reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."). Note, however, that the Framers did not necessarily express a desire for a free market economy. *See* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 429 (1982).

72. U.S. Const. art. I, § 8, cl. 3. *See also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

73. H.P. Hood & Sons, Inc. v. Du Mond Comm'r of Agric. and Mkts. of N.Y., 336 U.S. 525, 533 (1949) ("'[E]ach state would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view.' This came 'to threaten at once the peace and safety of the Union.'").

> partial interests might be disposed to introduce and maintain.[74]

Thus, the Framers saw state balkanization as a fundamental flaw in the Articles of Confederation and sought to remedy the situation by granting Congress the authority to regulate commerce among the states.[75]

The Constitution, however, does not state whether this grant of power to Congress precludes states from regulating interstate commerce or regulating some other subject within their general police powers that incidentally affects interstate commerce.[76] Conceivably the set of subjects that Congress may regulate under its Commerce Clause powers overlaps with the set of subjects that states may regulate under their police powers.[77] When Congress has not regulated a subject within this overlap, states may regulate in this area as long as such regulation is consistent with the purpose of the Commerce Clause[78]—that is, insulating internal markets from out-of-state competition.[79] Additionally, as long as Congress has the power under the Commerce Clause, it may expand the power of states to regulate interstate commerce where the Dormant Commerce Clause would otherwise preclude the state from legislating.[80]

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74. Veazie & Young v. Moor, 55 U.S. (14 How.) 568, 574 (1852).

75. *See H.P. Hood & Sons, Inc.*, 336 U.S. at 535.

76. ROTUNDA & NOWAK, *supra* note 70 § 11.1.

77. *See Gibbons*, 22 U.S. (9 Wheat.) at 204 ("[I]f a State in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the State, and may be executed by the same means.").

78. *See* Hill v. State of Fla. *ex rel.* Watson, 325 U.S. 538, 547 (1945) ("The States . . . may speak on matters even in the general domain of commerce so long as Congress is silent.").

79. *See H.P. Hood & Sons, Inc.*, 336 U.S. at 532 ("[A] State may not promote its own economic advantages by curtailment or burdening of interstate commerce.").

80. South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87-88 (1984).

The Supreme Court has developed the structure and form of Dormant Commerce Clause jurisprudence over almost two centuries.[81] Today, modern Dormant Commerce Clause jurisprudence consists of two tests to determine whether a law unconstitutionally burdens interstate commerce.[82] State laws that are not even-handed, that is laws that facially discriminate against out-of-state interests, are presumed invalid unless the state can show that there is a non-protectionist reason for treating in-state residents more favorably than out-of-state residents and that there are no other less discriminatory means to effectuate this legitimate purpose.[83] In other words, courts will apply strict scrutiny to state laws that a court determines facially discriminate against interstate commerce and thus such laws will likely be invalidated.[84]

On the other hand, facially neutral laws that regulate "evenhandedly with only 'incidental' effects on interstate commerce:

> will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[85]

The *Pike* test, as this balancing test is called, upholds a state statute unless the burdens created by the statute on interstate commerce clearly outweigh the benefits to the state.[86] Thus, if a court determines that the law does not facially discriminate against interstate commerce that law will likely withstand that court's scrutiny. For these reasons, the threshold question of whether the state law at issue is facially discriminatory likely makes the difference whether that law will be upheld.

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81. *Gibbons* was the first "Dormant Commerce Clause case." 22 U.S. (9 Wheat.) at 1.

82. Chambers Med. Technologies of S.C., Inc. v. Bryant, 52 F.3d 1252, 1256 (1995).

83. Hughes v. Oklahoma, 441 U.S. 332, 336; Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

84. *See Hughes*, 441 U.S. at 337.

85. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

86. *Id.*

### B. *Maine v. Taylor—The Dormant Commerce Clause Applied to SISLAPs*

The Supreme Court set the precedent for scrutinizing SISLAPs under the Dormant Commerce Clause in *Maine v. Taylor*.[87] This case established the precedent that SISLAPs should be treated the same as any other state law for purposes of Dormant Commerce Clause analysis.[88] Taylor, a citizen of Maine, was charged with violating the Lacey Act by importing baitfish in violation of a Maine statute.[89] This statute made it unlawful for any person to import live baitfish into Maine.[90] Taylor's sole defense was that the Maine statute violated the Dormant Commerce Clause because it unconstitutionally burdened interstate commerce.[91]

The district court convicted Taylor, finding that the Maine law did not violate the Dormant Commerce Clause despite concluding that the law facially discriminated against interstate commerce.[92] Without providing a basis for its reasoning, the district court concluded that the Maine law facially discriminated against interstate commerce.[93] Even though the case involved section 3372(a)(2) of the Lacey Act, which is enforced by cooperating state and federal governments, the district court declined to lower the level of scrutiny, reasoning that Congress, by enacting the Lacey Act, did not expressly intend for predicate laws under it to be insulated from Commerce Clause analysis.[94]

The First Circuit reversed the judgment of the district court that the Maine statute could withstand dormant Commerce Clause strict scrutiny.[95] The court concluded that, absent Congress's express consent,

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87. 477 U.S. 131 (1986).

88. *See id.* at 139.

89. *Id.* at 132.

90. *Id.* at 133; *See also* ME. REV. STAT. ANN., tit. 12 § 7613 (1981).

91. *Taylor*, 477 U.S. at 133.

92. United States v. Taylor, 585 F. Supp. 393, 394-398 (D. Me. 1984). (concluding that, while the statute discriminated facially discriminated against interstate commerce, it served a legitimate local interest and that less discriminatory alternatives were not available).

93. *Id.* at 395.

94. *Id.* at 394 & n.3, 395.

95. United States v. Taylor, 752 F.2d 757, 761 (1st Cir. 1985).

it would analyze the law under the Dormant Commerce Clause as if Congress was never involved.[96] The appellate court found that the statute should be given strict scrutiny because it intentionally burdened interstate commerce.[97] The appellate court reversed the district court's decision because it found that Maine could not overcome strict scrutiny analysis; the state neither proved that the statute effectuated a legitimate non-protectionist purpose nor that the statute was narrowly tailored to effectuate its proffered purpose.[98]

The case was appealed to the Supreme Court which, relying on *South-Central Timber Development, Inc. v Wunnicke,*[99] also held that Lacey Act predicate laws should be treated like any other laws under the Dormant Commerce Clause.[100] In *South-Central Timber*, the state of Alaska argued that Congress impliedly approved of its law requiring timber harvesters to process logs harvested in the state.[101] The justification for Alaska's claim was that a federal law required the same for timber harvested from federal land.[102] However, the Court in *South Central Timber* rejected this argument, holding that a parallel federal law does not shield a state law from Dormant Commerce Clause scrutiny.[103] Moreover, the Court concluded that Congress must be "unmistakably clear" of its intent to insulate par-

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96. *Id.* at 764 (noting that the Supreme Court has stated "that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear" and concluding that, here, an unmistakably clear design to validate state laws cannot be found where the overarching principle embodied in the legislative history is the intent to back up valid state enactments with federal enforcement power). *Id.*

97. *Id.* at 760.

98. *Id.* at 763.

99. 467 U.S. 82 (1984).

100. Maine v. Taylor, 477 U.S. 131, 140 (1986).

101. *Wunnicke*, 467 U.S. at 89.

102. *Id.*

103. *Id.* at 92 ("The fact that the state policy appears to be consistent with federal policy is an insufficient indicium of congressional intent. Congress acted only with respect to federal lands; we cannot infer from that fact that it intended to authorize a similar policy with respect to state lands.") *Id.*

ticular state laws from Dormant Commerce Clause scrutiny; otherwise, the risk of state protectionism is too high.[104]

In *Taylor*, the Court similarly held that in order for Congress to insulate a state law from Dormant Commerce Clause scrutiny, Congress must clearly express its intent to do so.[105] Maine's example of language evincing Congressional intent to insulate Lacey predicate laws was this excerpt from the Senate Report on the 1981 Lacey Act Amendments:

> It is desirable to extend protection to species of wildlife not now covered by the Lacey Act, and to plants which are presently not covered at all. States and foreign governments are encouraged to protect a broad variety of species. Legal mechanisms should be supportive of those governments.[106]

The Court found that this section of legislative history was not enough to demonstrate an unmistakably clear Congressional intention to override the Dormant Commerce Clause.[107]

Moreover, the *Taylor* Court went one step further. Maine argued that even if the Court found that Congress did not intend to insulate Lacey Act predicate laws from Dormant Commerce Clause scrutiny, Congress stressed the importance of Lacey Act predicate law in its legislative history for the 1981 Lacey Act Amendments; therefore, the Court should lower the intensity of its scrutiny of SISLAPs.[108] The Court, however, rejected this argument, holding that either Congress insulates state laws from Dormant Commerce Clause scrutiny or the laws will be scrutinized like any other state law.[109] Thus, the *Taylor* Court concluded that Lacey Act predicate laws will not be

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104. *Id.* at 91 ("A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that underrepresented interests will be adversely affected by restraints on commerce.") *Id.* at 92.

105. *Taylor*, 477 U.S. at 139.

106. *Id.* at 140 (quoting S. REP. NO. 97-123, at 3-4 (1981)).

107. *Id.*

108. *Id.* at 139. Although Maine conceded before the Court that the Lacey Act Amendments do not exempt state wildlife legislation from scrutiny under the Commerce Clause, the State insisted, however, that the Amendments should lower the *intensity* of the scrutiny that would otherwise be applied. *Id*

109. *Id.*

treated differently than any other state laws for Dormant Commerce Clause purposes.

With this issue settled, the *Taylor* Court next determined that the Maine law facially discriminated against interstate commerce and should therefore be subjected to strict review.[110] The Court relied on *Hughes v. Oklahoma*[111] in coming to this conclusion.[112] *Hughes* was an appeal of a conviction of a violation of a state wildlife law that did not involve a Lacey Act prosecution.[113] The *Hughes* Court concluded that when scrutinizing state wildlife statutes under the Dormant Commerce Clause a court:

> [M]ust inquire (1) whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.[114]

The first question was the threshold question. If a court concludes that the statute does not regulate evenhandedly or that it facially or effectively discriminates between in-state and out-of-state interests,

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110. *Id.* at 144. But like the district court opinion, the Supreme Court did not give its reasoning for this conclusion.

111. 441 U.S. 332, 328 (1979).

112. *Taylor*, 477 U.S. at 144.

113. *Hughes,* 441 U.S. at 328. It is interesting, however, to note that an article often cited as an authority on the Lacey Act states that *Hughes* did involve a Lacey Act violation. *See* Anderson, *supra* note 12 at 76 ("[I]n Hughes v. Oklahoma, a defendant was convicted of Lacey Act charges after exporting minnows...."). In fact, the Supreme Court case was an appeal of a *state* court opinion, Hughes v. State, 572 P.2d 573 (Okla. Crim. App. 1977), affirming the appellant's conviction for violating an Oklahoma law. *See* Anderson, *supra* note 12 at 76 ("[I]n Hughes v. Oklahoma, a defendant was convicted of Lacey Act charges after exporting minnows....").

114. 441 U.S. at 336.

then the court will apply strict scrutiny represented by the second and third steps of the quoted analysis.[115]

The law at issue in *Hughes* unlike the law at issue in *Taylor* did not regulate the importation of an invasive species. Instead, it prohibited the transportation or shipment of minnows fished out of Oklahoma waters for sale outside of the state.[116] The Court determined that because the law prohibited the exportation of minnows from the state it "overtly block[ed] the flow of interstate commerce at [the] State's borders."[117] From this, the Court concluded that the statute facially discriminated against interstate commerce.[118] Presumably, this reasoning was adopted by the Court in *Taylor*.[119]

Despite applying the "strictest scrutiny" to the Maine law at issue in *Taylor*, the Court found that the law did not violate the Dormant Commerce Clause.[120] The Court deferred to the fact-finding of the district court and concluded that the bait fish law effectuated a legitimate, non-protectionist purpose.[121] The Court also deferred to

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115. *See* Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 99 (1994) ("If a restriction on commerce [imposed by a state law] is discriminatory, it is virtually *per se* invalid.").

116. *Hughes*, 441 U.S. at 323.

117. *Id.* at 336-37 (quoting Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)) (alterations in original).

118. *Id.*

119. The Supreme Court simply says that both lower courts correctly applied *Hughes* and determined that the Maine law facially discriminated against interstate commerce. Maine v. Taylor, 477 U.S. 131,139 (1986). The Supreme Court is just about as mysterious as the district court, simply concluding that the Maine statute facially discriminates against interstate commerce. *See Taylor*, 477 U.S. at 138 ("The District Court and the Court of Appeals both reasoned correctly that, since Maine's import ban discriminates on its face against interstate trade, it should be subject to the strict requirements of *Hughes v. Oklahoma*....."). Nevertheless, both courts cite *Hughes* for this conclusion. Because the law at issue in *Hughes* is so similar to the law at issue in *Taylor*, it follows that the district court and the Supreme Court relied on more than the rule in that case by also relying on the *Hughes* Court's characterization of the Oklahoma statute.

120. *Id.* at 151-52.

121. *Id.* at 148. The Court discounted evidence in the form of a statement submitted by the Maine Department of Inland Fisheries in

the district court's conclusion that the law interfered with interstate commerce no more than necessary to carry out that purpose.[122] For these reasons, the Court upheld the SISLAP in *Taylor*.[123]

### C. *Taylor's Effect on SISLAPs*

The Court held that all Lacey Act predicate laws will be scrutinized as intensely as any other state laws under the Dormant Commerce Clause. In terms of SISLAPs, such as the law at issue in *Taylor*, the *Taylor* holding undoubtedly means that almost all state invasive species laws will be subject to the "strictest scrutiny." State invasive species laws almost invariably impose bans on the importation of listed or unlisted species that the state has determined threaten native species.[124] Absolute bans on the importation of out-of-state goods facially discriminate against interstate commerce.[125]

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opposition to a proposed repeal of the law, that the Court of Appeals found indicated that the Maine law had a protectionist purpose:

> We can't help asking why we should spend our money in Arkansas when it is far better spent at home? It is very clear that much more can be done here in Maine to provide our sportsmen with safe, home-grown bait. There is also the possibility that such an industry could develop a lucrative export market in neighboring states.

*Id.* at 149.

122. *Id.* at 146. The Court cited evidence that sufficient testing of bait fish for parasites had not been developed. On the other hand, evidence that such tests were feasible and that Maine allowed the importation of other fish without inspections was weighed by the district court but ultimately disregarded. *Id.*

123. *Id.* at 152.

124. *See supra* notes 54-56 and accompanying text.

125. *See, e.g.*, Philadelphia v. New Jersey, 437 U.S. 617 (1978) (holding that a New Jersey law banning the importation of waste into the state facially discriminated against interstate commerce); Dickerson v. Bailey, 336 F.3d 388, 396 (5th Cir. 2003) (holding that a Texas law banning the importation of out-of-state wine facially discriminated against interstate commerce); Used Tire Intern. Inc., v. Diaz-Saldana, 155 F.3d 1, 3 (1998) (holding that a Puerto Rico law banning the importation of used tires below a certain tread facially discriminated against interstate commerce).

However, despite holding that laws prohibiting the importation of a species are to be subjected to the strictest scrutiny, the Court in *Taylor* also held that it will uphold a state law that is necessary to further a "legitimate local purpose."[126] This indicates that the Court requires two things to uphold a law under the strict *Hughes* test: (1) that the law furthers a "legitimate local purpose;" and (2) that the law restricts interstate commerce only to the degree necessary to effectuate that purpose.[127] For this first question, it seems the Court will apply a rational basis test—that is determine whether the state law is rationally related to a non-protectionist purpose.[128] The only difference between this formulation and the *Pike* test is that under the *Pike* test the amount of permitted interference of interstate commerce depends on the importance of the purpose of the law.[129]

This characterization of the *Taylor* holding is further evidenced by the Court's treatment of the SISLAP at issue in that case. The *Taylor* Court recognized the importance of protecting a state's native wildlife from the effects of invasive species. The Court found the Maine bait fish law furthered a legitimate local purpose even without definitive scientific proof that allowing out-of-state bait fish into the state would cause serious harm[130] and with evidence that the law might indeed be protectionist.[131] Indeed, one commentary describes the possibility that the Court in *Taylor* did not rely on the highest level of scrutiny of the Maine SISLAP:

> [u]nder the Court's current formulation, the state must overcome a formidable burden of proof, given the strong presumption against facially discriminatory statutes. We are not sure the Taylor Court's scrutiny was quite this rigorous in reality. The evidence on behalf of the state

126. *Taylor*, 477 U.S. at 138.

127. *Id.*

128. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 5.3.6 (2d ed. 2002).

129. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.").

130. *Taylor*, 477 U.S. at 148.

131. *Id.* at 150.

> shows the statute had a possible justification, but not that it, in fact, was necessary.[132]

Thus, despite claiming to apply the strictest scrutiny to the SISLAP in *Taylor*, the Court questioned whether the law was rationally related to combating invasive species and whether the law was narrowly tailored to carry out that purpose.

## III. A REEXAMINATION

### A. *SISLAPs Require A Different Level of Dormant Commerce Clause Scrutiny*

Under either the *Hughes* test or the *Pike* test, courts typically invalidate two classes of state laws under the Dormant Commerce Clause: (1) laws that states legislatures intended to insulate in-state markets from out-of-state competition; and (2) laws that state legislatures intended to insulate state residents from the burdens of a commercial activity to the detriment of residents of other states.[133] Almost invariably, when courts strike down a state law on Dormant Commerce Clause grounds, the Court has determined that the state's

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132. Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A Gatt's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1434 (1994).

133. *See, e.g.*, West Lynn Creamery v. Healy, 512 U.S. 186, 194 (1994) (invalidating a state milk pricing order because "[i]ts avowed purpose and its undisputed effect are to enable higher cost Massachusetts dairy farmers to compete with lower cost dairy farmers in other States"); Kassel v. Consol. Freightways Corp. of Delaware, 450 U.S. 662 (1981) (invalidating an Iowa law barring use of trucks longer than sixty feet on Iowa's interstate highways because the law protected in-state drivers from the hazards of heavy truck traffic at the expense of the safety of drivers in neighboring states); Philadelphia v. New Jersey, 437 U.S. 617 (1978) (invalidating a New Jersey law that banned the importation of out-of-state waste at least partially for the purpose of preserving landfill space within the state to the detriment of neighboring states); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977) (invalidating a law requiring a specific inspection of apples sold within the state because it protected in-state apple growers from out of state competition).

proffered purpose for the enacting the law was a pretext and that the real purpose of the law was to further one of these two illicit protectionist motives.[134]

However, SISLAPs are rarely protectionist. The SISLAP in *Taylor* represents the most likely case for such a law to be protectionist. Indeed, the facts surrounding the *Taylor* bait fish law were more conducive to a finding that the law was protectionist than the facts surrounding other SISLAPs. Taylor produced some evidence against Maine that demonstrated that perhaps Maine was protecting its bait fish market from out-of-state competition.[135] Unlike most of the species regulated under SISLAPs, many states have substantial bait fish industries.[136] For example, many state laws ban the importation of species not native to the United States, such as the Asian swamp eel[137] or the European green crab.[138] State legislatures, in

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134. *See, e.g.*, *West Lynn Creamery*, 512 U.S. at 196 (holding that the real purpose of a pricing order was to insulate in-state milk producers from out-of-state competition); *Kassel*, 450 U.S. at 677 (holding that the real purpose of an Iowa truck length restriction was to insulate in-state residents from the hazards of interstate truck traffic to the detriment of the residents of the surrounding states ); *Philadelphia*, 437 U.S. at 629 (holding that at least to some extent, a purpose behind a New Jersey law that banned the importation of out-of-state waste was to preserve landfill space within the state to the detriment of neighboring states); *Hunt*, 432 U.S. 353-54 (holding that the real purpose for a North Carolina apple inspection law was to insulate in-state apple growers from out-of-state competition).

135. *See supra* note 121.

136. *See* Thomas G. Meronek et al., *The Bait Industry in Illinois, Michigan, Minnesota, Ohio, South Dakota, and Wisconsin* 5 (1997), *at http://aquanic.org/publicat/usda_rac/tr/ncrac/tb105.pdf* (discussing the state of the golden shiner industry).

137. *See, e.g.*, TEX. PARKS & WILD. CODE § 66.007 (2003). The Asian swamp eel is a species not native to the U.S. that biologists have found in Georgia's Chattahoochee River and the Florida Everglades. The Water Resources Research Institute, *Another Invasive Exotic*, at *http://www2.ncsu.edu/ncsu/CIL/WRRI/news/ja98digest.html#Another%20invasive*. The Asian swamp eel is particularly noxious because:

enacting such laws, cannot insulate an in-state market from out-of-state competition where no such market exists.[139] Moreover, when a SISLAP is before a court it is because the federal government prosecuted the violation of state law under the Lacey Act. The federal government will likely have no interest in prosecuting a violation of a protectionist state law because such a law would likely not further the purpose of the Lacey Act.[140]

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> [t]he eels are highly secretive, with most of their activities occurring at night. In the day, the fish hide in thick aquatic vegetation or in small burrows and crevices along the water's edge. In many populations, all young are hatched as females. Then, after spending part of their life as females, the eels transform into large males. The exotic creature is a highly adaptable predator, able to breathe air and to live easily in even a few inches of water, especially in warm climates. Although few nonnative fishes invade natural wetlands—instead being primarily found in disturbed habitats such as canals and drainage ditches—the swamp eel's biology makes it well suited for all kinds of habitats.

*Id.*

138. *See, e.g.* WAC 220-72-076 (2003). The European green crab has been found along the western coast of the U.S. *Aquatic Nuisance Species*, *at* http://www.alaska.net/~aknafws/aquatic.html. The European green crab is particularly noxious because it "is voracious, and has been described as an eating machine." *Id.* Moreover, "[t]hey have stronger and more maneuverable claws than other crabs." *Id.*

139. The European brown crab in particular has virtually no value as it is not suitable to eat. *Id.*

140. This is not to say that all prosecutions are pursued with the purpose of the law in mind. It is certainly conceivable that the federal government might prosecute any violation of state law that involves the taking, possession, transportation, or sale of wildlife in violation of state law that does not further either the prevention of over-harvesting or the prevention of introducing an invasive species. *See supra* notes 24-25 and accompanying text. Such a prosecution, however, is unlikely, not only because most state invasive species laws are not protectionist, but also because the federal government

In addition, SISLAPs are more akin to quarantine laws which have historically been treated more favorably under the Dormant Commerce Clause than other state laws since such laws are generally non-protectionist.[141] Under the quarantine exception, a state quarantine law is upheld as long as it is rationally related to the purpose of a quarantining and narrowly tailored to effectuate that purpose.[142] This is almost precisely the test used in *Taylor*.[143] The Supreme Court has held that quarantine laws effectuate an important local purpose because they serve to prevent exposure to disease, injury, or destruction to a state's people and wildlife.[144] Certainly, state inva-

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has limited resources and if has to choose between two cases will likely take the case more in-line with the purpose of the Act.

141. In fact, several other commentators have characterized *Taylor* as an example of the Court recognizing bans on the importation of invasive species as falling under the "quarantine exception" to the Dormant Commerce Clause. *See, e.g.* Blair P. Bremberg & David C. Short, *The Quarantine Exception to the Dormant Commerce Power Doctrine Revisited: The Importance of Proofs in Solid Waste Management Cases*, 21 N.M.L. REV. 63, 78 (1990); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1270 (1986).

142. Bowman v. Chi. & N. Ry., 125 U.S. 465, 491 (1888). ("While ... a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the State; while for the purpose of self-protection it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or state commerce...." (quoting Railroad Co. v. Husen, 95 U.S. 465) in which the court invalidated a Missouri law prohibiting driving cattle into that state between March 1 and Nov 1 of each year. The court said the law was more than a quarantine regulation and not a legitimate exercise of the police power of the state).

143. *See supra* note 126 and accompanying text.

144. Oregon-Washington R. & Nav. Co. v. Wash., 270 U.S. 87, 93 (1926). This case held that:

sive species laws protect a state's wildlife from disease, injury, or destruction.

In spite of the similarities, the quarantine exception does not go far enough to protect SISLAPs. Unlike quarantine laws, SISLAPs effectuate not only an important state purpose, but also an important national purpose. One of the founding purposes of the Lacey Act was to protect domestic wildlife from the threat of invasive species.[145] When the federal government uses the Lacey Act to enforce a state invasive species law, that prosecution is not just for the benefit of the state, but also for the benefit of the nation.[146] Moreover, to further this important national purpose, the federal government needs the states to legislate because national attempts at combating invasive species have generally failed.[147] Thus, without state invasive species laws, there would be no useful predicate laws on which to combat invasive species with the Lacey Act. Instead of threatening state invasive species laws with Dormant Commerce Clause challenges, states should be encouraged to enact invasive species laws to effectuate the purpose of the Lacey Act.

### B. *A Presumption of Validity*

Courts should presume that SISLAPs further a legitimate purpose unless the party challenging the law produces evidence that the law is protectionist. For example, the challenging party might present evidence of a significant in-state production of the banned species, legislative history expressing some protectionist motive, or evidence that the effect of the law is to insulate the state from the effects of invasive species to the detriment of other states. This is significantly

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> [i]n the absence of any action taken by Congress on the subject-matter, it is well settled that a state, in the exercise of its police power, may establish quarantines against human beings, or animals, or plants, the coming in of which may expose inhabitants, or the stock, or the trees, plants, or growing crops to disease, injury, or destruction, even though affecting interstate commerce.

*Id.*

145. *See supra* note 12 and accompanying text.

146. *See* 33 CONG. REC. 4871 (1900) (discussing the threat that several nonnative species pose to the nation as a whole).

147. *See supra* notes 57-61 and accompanying text.

different from the test articulated in *Taylor* and the quarantine cases in that the burden is on the challenger rather than the state. Under the test articulated in those cases, the state has the burden of showing that the law is rationally related to protecting the state from harmful imports. Though the state need only meet a rational-basis standard, the burden is nevertheless on the state.[148] Maintaining the burden on the state might discourage states from enacting more invasive species laws for fear of defending a Dormant Commerce Clause challenge.

While protecting laws that effectuate the purpose of the Lacey Act is important, Courts also need to recognize the importance of the Dormant Commerce Clause. However slight, there is still a risk that states might use a less stringent Dormant Commerce Clause test for SISLAPs to insulate protectionist state laws from Dormant Commerce Clause scrutiny. It is true that the challenger would likely produce evidence of this protectionist purpose, but courts should still have a mechanism for protecting interstate commerce absent such evidence. For this reason, courts should continue to require that SISLAPs be narrowly tailored to further the purpose of the Lacey Act. This will ensure that states will not abuse the presumption of validity and that state legislatures will strongly consider the law's impact on interstate commerce.

## CONCLUSION

In sum, courts should recognize the import federal and state role SISLAPs play in combating invasive species by presuming that they effectuate the purpose of the Lacey Act. Courts, however, should also recognize the importance of the free flow of interstate commerce by requiring that state legislatures narrowly tailor such laws to protect against invasive species while burdening interstate commerce as little as possible. This will result in courts promoting Congressman Lacey's lofty goals for the conservation of native wildlife by encouraging states to enact more laws to protect against invasive species and the federal government to prosecute violations of these laws under the Lacey Act more frequently.

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148. *See supra* notes 141-42 and accompanying text.